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No. 04-1130

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THOMAS SHARPE, M.D.,

Petitioner,

v.

CHARLES P. CONOLE, ROBERT LEADER, MIKE LAWLER, VIRGILIO RIGOR, M.D., DONALD SCHUESSLER, M.D., JANUSZ MROZ, M.D., STEVE BURKHART, M.D., SUNY SYRACUSE HEALTH SCIENCE CENTER, NYS DEPARTMENT OF HEALTH, BARBARA DEBUENO, M.D., COMMISSIONER, MARTHA ELLEN, WATERTOWN DAILY TIMES, VIJAY KUMAR, M.D., and JUDITH J. CHOATE, ADMINISTRATRIX OF THE ESTATE OF JOHN W. CHOATE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS CHARLES P. CONOLE, ROBERT LEADER, MIKE LAWLER, VIRGILIO RIGOR, DONALD SCHUESSLER, M.D., JANUSZ MROZ, M.D. AND VIJAY KUMAR, M.D.

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

1. Did the District Court properly dismiss Petitioner's causes of action against Respondents Conole, Leader, Rigor, Schuessler, Kumar, Lawler and Mroz under the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248 ("FACE Act") on the ground that Petitioner failed to allege or offer proof of the motivation required by the FACE Act?

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FACE Act, 18 U.S.C. § 248 ..... *passim*

RULE

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RELEVANT STATUTES AND REGULATIONS

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
CHAPTER 13 - CIVIL RIGHTS

§ 248. Freedom of access to clinic entrances [hereinafter "FACE Act"].

(a) Prohibited activities. – Whoever –

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;

(2) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or

(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship, shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

(b) Penalties. – Whoever violates this section shall –

(1) in the case of a first offense, be fined in accordance with this title, or imprisoned not more than one year, or both; and

(2) in the case of a second or subsequent offense after a prior conviction under this section, be fined in accordance with this title, or imprisoned not more than 3 years, or both; except that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than $10,000 and the length of imprisonment shall be not more than six months, or both, for the first offense; and the fine shall, notwithstanding section 3571, be not more than $25,000 and the length of imprisonment shall be not more than 18 months, or both, for a subsequent offense; and except that if bodily injury results, the length of imprisonment shall be not more than 10 years, and if death results, it shall be for any term of years or for life.

(c) Civil remedies. –

(1) Right of action. –

(A) In general. – Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services, and such an action may be brought under subsection (a)(2) only by a person lawfully exercising or seeking to exercise the First

Amendment right of religious freedom at a place of religious worship or by the entity that owns or operates such place of religious worship.

(B) Relief. – In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses. With respect to compensatory damages, the plaintiff may elect, at any time prior to the rendering of final judgment, to recover, in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation.

(2) Action by Attorney General of the United States. –

(A) In general. – If the Attorney General of the United States has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, the Attorney General may commence a civil action in any appropriate United States District Court.

(B) Relief. – In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, and compensatory damages to persons aggrieved as described in paragraph (1)(B). The court, to vindicate the public interest, may also assess a civil penalty against each respondent –

(i) in an amount not exceeding $10,000 for a nonviolent physical obstruction and $15,000 for other first violations; and

(ii) in an amount not exceeding $15,000 for a nonviolent physical obstruction and $25,000 for any other subsequent violation.

(3) Actions by State Attorneys General. –

(A) In general. – If the Attorney General of a State has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, such Attorney General may commence a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any appropriate United States District Court.

(B) Relief. – In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, compensatory damages, and civil penalties as described in paragraph (2)(B).

(d) Rules of construction. – Nothing in this section shall be construed –

(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution;

(2) to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, occurring outside a facility, regardless of the point of view expressed, or to limit any existing legal remedies for such interference;

(3) to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt State or local laws that may provide such penalties or remedies; or

(4) **to interfere with the enforcement of State or local laws regulating the performance of abortions or other reproductive health services.**

(e) Definitions. – As used in this section:

(1) Facility. – The term "facility" includes a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located.

(2) Interfere with. – The term "interfere with" means to restrict a person's freedom of movement.

(3) Intimidate. – The term "intimidate" means to place a person in reasonable apprehension of bodily harm to him- or herself or to another.

(4) Physical obstruction. – The term "physical obstruction" means rendering impassable ingress to or egress from a facility that provides reproductive health services or to or from a place of religious worship, or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous.

(5) Reproductive health services. – The term "reproductive health services" means reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counseling or

referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

(6) State. – The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

COUNTER-STATEMENT OF THE CASE

Petitioner, Thomas Sharpe, M.D., proceeding *pro se*, commenced this action on June 15, 1999 in the United States District Court for the Northern District of New York. He alleged that Respondents Conole, Leader, Rigor, Schuessler, Kumar, Lawler and Mroz (hereinafter "Respondents"), all of whom were either fellow physicians or administrators at E.J. Noble Hospital ("the Hospital") in Gouverneur, New York, where the Petitioner focused his obstetrical practice, violated the FACE Act. The Petitioner alleged that, in violation of the FACE Act, the Respondents intentionally obstructed his provision of reproductive health services and that their unlawful conduct was motivated by greed, professional rivalry, personal animosity and, in one instance, intoxication.

By Decision and Order dated August 6, 1999, District Court permitted the Petitioner to file an Amended Complaint, which the Respondents subsequently moved to dismiss on the ground that the Amended Complaint was fatally defective because it failed to allege that any of the conduct attributed to the Respondents was motivated by the Petitioner's status as a provider of reproductive health care services or by an intent to deter individuals from receiving reproductive health care services.

District Court notified the parties that it would convert the motion to dismiss to one for summary judgment, and allowed the submission of additional materials in support or opposition to that motion. District Court then granted dispositive relief to the Respondents.[1] The complete procedural history is set forth in District Court's Decision and Order dated March 31, 2000 and the Magistrate Judge's Decision-Order and Report-Recommendation dated March 23, 2000.

With respect to the facts underlying the action, the Petitioner was formerly a licensed physician specializing in obstetrics and gynecology with admitting privileges at the Hospital. On May 22, 1996, his privileges at the Hospital were suspended pending an investigation by the New York State Department of Health. The Petitioner appealed the suspension in State court. Following an administrative review, his privileges were permanently suspended and he surrendered his license to practice medicine in New York on June 11, 1997.

Petitioner then commenced this action, alleging that the Respondents had violated the FACE Act by, *inter alia*: (1) interfering with his ability to properly care for his patients and stealing or misdirecting patient records; (2) blocking his access to his patients and to the Hospital; (3) preventing childbirth education at the Hospital; (4) harassing and stalking his patients, including pressuring them to change

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[1] District Court issued a Memorandum Decision and Order dated December 7, 2000 granting summary judgment to Respondents Conole, Leader, Rigor, Kumar and Schuessler (Docket No. 104) and a Decision and Order dated March 31, 2000 dismissing Petitioner's Amended Complaint as against Lawler and Mroz (Docket No. 70).

doctors; and (5) coercing the medical staff at the Hospital to drop objections made on his behalf to the interference with medical care at the Hospital.

Following District Court's dismissal of the Amended Complaint as against the Respondents, the Petitioner appealed to the Court of Appeals for the Second Circuit, which affirmed the Judgment of the District Court (2004 U.S. App. LEXIS 21479 [2d Cir. N.Y. Oct. 15, 2004]). In its Decision, the Second Circuit stated that, construing the Petitioner's Amended Complaint broadly; interpreting it to raise strongest arguments it suggested; accepting as true the allegations in the Amended Complaint; and resolving all ambiguities and drawing all factual inferences in favor of the Petitioner, it had reviewed the contentions of the Amended Complaint and found them to be without merit. The Court addressed the requisite allegation of intent to state a claim under the FACE Act and held that the Petitioner had not alleged the motivation required by the FACE Act.

REASONS FOR DENYING THE PETITION

DISTRICT COURT CORRECTLY CONCLUDED THAT PETITIONER FAILED TO ALLEGE THE SPECIFIC MOTIVATION REQUIRED TO STATE A CLAIM UNDER THE FACE ACT

The stated purpose of the FACE Act is

> to protect and promote the public safety and health in activities affecting interstate commerce by establishing Federal criminal penalties and civil remedies for certain violent, threatening, obstructive and destructive conduct that is

> intended to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health services.

Act of Oct. 22, 1993, Pub. L. No. 103-259, 1994 U.S.C.C.A.N. (103 Stat.) 699. To state a civil claim under subsection (a)(1) of the FACE Act, a plaintiff must allege that a defendant: (1) used force or threat of force or physical obstruction of a reproductive health facility; (2) to intentionally injure, intimidate or interfere with or attempt to injure, intimidate or interfere with a person; (3) because the interfered-with person is or has been obtaining or providing reproductive health services or in order to intimidate such person or any other person or class of persons from obtaining or providing reproductive health services. *See United States v. Balint*, 201 F.3d 928, 932 (7th Cir. 2000); *United States v. White*, 893 F. Supp. 1423 (C.D. Cal. 1995).

The final House Judiciary Committee report issued prior to the enactment of the legislation addressed the required element of motivation:

> Subsection 248 (a)(1) would cover acts of force, threats of force and physical obstruction that intentionally injure, intimidate, or interfere with any person, but only if those actions are undertaken because the victim or others are obtaining or providing reproductive health services. In order to narrowly tailor this legislation to those activities found by the Committee to warrant new federal remedies, the act requires that the offender be motivated by the involvement of the victim or others in obtaining or providing reproductive health services.

H.R. Rep. No. 306, 103 D. Cong. 2d Sess. 6-7 (1993), reprinted in 1994 U.S.C.C.A.N. 699. Hence, under the statute, conduct otherwise prohibited is not actionable absent an allegation and showing of the requisite motivation.

The Petitioner's Amended Complaint contained 21 paragraphs addressing the motivation of the Respondents. In his Amended Complaint, the Petitioner ascribed various motives to the Respondents, including greed, professional rivalry, personal animosity and intoxication. None of the allegations of the Amended Complaint, however, stated that any of the Respondents were motivated by either the involvement of the Petitioner in providing reproductive health services or the involvement of patients in obtaining reproductive health services. The various motives ascribed to the Respondents did not fall within the scope of the intent required by the FACE Act and, hence, were properly found to fail to state a claim under the FACE Act.

As was noted by the District Court in its Memorandum-Decision and Order dated December 7, 2000, the Petitioner's reliance on *United States v. Weslin*, 156 F.3d 292 (2d Cir. 1998) is misplaced. The Petitioner misinterprets *Weslin* as meaning that he had to show only that the Respondents actually interfered or obstructed his provision of reproductive services, not that their conduct was motivated by the fact that he provided such services. That interpretation is not supported by either the language of the statute itself or by case law. *See, e.g., United States v. Lynch*, 162 F.3d 732 (2d Cir. 1998); *United States v. Operation Rescue Nat'l*, 111 F. Supp. 2d 948 (S.D. Ohio, 1999); *United States v. Wilson*, 2 F. Supp. 2d 1170 (E.D. WI), *aff'd.* 154 F.3d 658 (2d Cir. 1998), *cert. denied* 525 U.S. 1081 (1999).

In *Roe v. Aware Woman Center for Choice, Inc.*, 357 F.3d 1226 (11th Cir. 2004), the 11th Circuit affirmed the District Court's grant of summary judgment in favor of the defendants dismissing a claim brought under the FACE Act. The dismissal was based on the fact that the record was devoid of any evidence that the defendants had the statutorily-required motive necessary to state a claim of a violation of the FACE Act. In that case, a prior action brought by the plaintiff had been dismissed by the District Court pursuant to Fed. R. Civ. P. 12 (b)(6) and the 11th Circuit remanded to permit the plaintiff to amend her complaint specifically to allege a claim under the FACE Act. She did so, following which the defendants moved for summary judgment dismissing the second complaint. District Court granted summary judgment to the defendants and, upon *de novo* review, the 11th Circuit affirmed.

The mere fact of an interference with or obstruction of the provision of reproductive services is insufficient to state a claim for a violation of the FACE Act. The conduct does not demonstrate the intent required by the statute. In this case, District Court provided the Petitioner with an opportunity to amend his Complaint to allege facts addressing motive. Petitioner availed himself of that opportunity and amended his Complaint, setting forth allegations of motive in detail. Specifically, in his Amended Complaint the Petitioner charged Respondents Conole, Leader, Rigor and Schuessler as being motived by financial gain in the form of kickbacks paid by Upstate Medical University Hospital for referring obstetrical patients that he presumes he would have otherwise treated. He charged Respondents Kumar and Schuessler as being motivated by professional rivalry and personal animosity fueled by his criticism of their medical practice. He charged Respondent Leader with being

motivated by a desire to find medical malpractice actions and alleged that Respondent Conole was motivated by the additional factor of his alleged personal intoxication. None of the motives he ascribed to the Respondents were sufficient to allege a FACT Act claim.

In addition, on the conversion of Respondents' dismissal motion to one for summary judgment, the Petitioner was granted additional time to assemble an evidentiary base for his alleged claim of a violation of the FACE Act. Instead, he simply reiterated his contention that an intent that would satisfy the requirements of the statute could be inferred by the mere showing of an interference or obstruction. The Petitioner's contention, that the only intent required to state a claim under the FACE Act is the intent to obstruct and interfere, without also alleging that the conduct was motivated by either his involvement in providing reproductive health services or the involvement of patients in obtaining reproductive health services, was properly rejected by District Court and by the Second Circuit. Since the Petitioner did not allege that the Respondents obstructed or interfered with his provision of reproductive services ***because*** he provided such services, his Amended Complaint did not state a viable claim under 18 U.S.C. § 248 (a)(1) and was properly dismissed.

CONCLUSION

Respondents Conole, Leader, Lawler, Rigor, Schuessler, Mroz and Kumar respectfully submit that the Petition herein should be denied.

Respectfully submitted,

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